STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

RAYMOND A MCCULLER,

Defendant-Appellant.
_____/

Supreme Court
No. 128161

Court of Appeals
No. 250000

Circuit Court
No. 02-183044-FH

128161

APPELLEE'S SUPPLEMENTAL BRIEF IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF BASIS OF JURISDICTION

This Court entered an order (Appendix A) on November 28, 2005, directing the Clerk of this Court to schedule oral argument on the Defendant-Appellant's application for leave to appeal from an unpublished opinion of the Court of Appeals. (Appendix B) entered on January 11, 2005. The opinion of the Court of Appeals affirmed the Defendant-Appellant's convictions of Assault With Intent To Do Great Bodily Harm Less Than Murder, MCL 750.84, and of Habitual Offender, Second Offense, MCL 769.10, and his sentence for those offenses in the Oakland County Circuit Court. The order of this Court directed the parties to file supplemental briefs addressing the effect, if any, of the opinion of the United States Supreme Court in Blakely v Washington, 542 US 296 (2004) upon the prison sentence of 2 to 15 years imposed in this case.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE OPINION OF THE UNITED STATES SUPREME COURT IN BLAKELY V WASHINGTON, 542 US 296 (2004) HAS ANY EFFECT UPON THE INDETERMINATE SENTENCE OF 2 TO 15 YEARS IMPRISONMENT IMPOSED UPON THE DEFENDANT PURSUANT TO THE SENTENCING SCHEME ADOPTED BY THE MICHIGAN LEGISLATURE?

The Court of Appeals answered this question "No."

The trial court was not asked to answer this question.

Defendant-Appellant answers this question "Yes."

Plaintiff-Appellee answers this question "No."

II. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION AND DEPRIVED THE DEFENDANT OF A FAIR TRIAL IN LIMITING THE DIRECT EXAMINATION OF A DEFENSE WITNESS AS TO THE POSSIBLE BIAS OF A PROSECUTION WITNESS?

The Court of Appeals answered this question "No."

The trial court answered this question "No."

Defendant-Appellant answers this question "Yes."

Plaintiff-Appellee answers this question "No."

COUNTER-STATEMENT OF FACTS

The Defendant Raymond Allen McCuller was charged in Oakland County Circuit Court with the offense of Assault With Intent To Commit Great Bodily Harm, MCL 750.84 and as a Habitual Offender, Second Offense, MCL 769.11. The Defendant was alleged to have assaulted Mr. Larry Smith, on September 25, 2001, in the City of Hazel Park. The Defendant's case was assigned to Oakland County Circuit Court Judge Richard D. Kuhn. The Defendant was convicted as charged by a jury and sentenced to a term of 2 to 15 years imprisonment. (T of 6/17/03, 9). The Court of Appeals affirmed the Defendant's convictions and sentence in an unpublished opinion (Appendix B) entered on January 11, 2005. This Court entered an order (Appendix A) on November 28, 2005, directing the parties to file supplemental briefs addressing the effect, if any, of the opinion of the United States Supreme Court in Blakely v Washington, 542 USA 296 (2004) on the prison sentence imposed in this case.

The Defendant's jury trial commenced on May 8, 2003, with Judge Kuhn presiding. After a jury was selected and opening statements by the assistant prosecutor and the Defendant's attorney, the People called Mr. Larry Smith as their first witness. Mr. Smith testified that he was 52 years-old. At approximately 7 P.M. on September 25, 2001, Mr. Smith was at Shotz Bar at Eight And A Half Mile and John R. in Hazel Park. Mr. Smith was with Ms. Shanna Cox with whom he had a romantic relationship at that time. (T of 5/8/03, hereafter T-I, 62-64). Ms. Cox stayed at Mr. Smith's house in August of 2001 after she had an argument with the Defendant Al McCuller. Mr. Smith had met the Defendant through Ms. Cox. Mr. Smith always assumed that Ms. Cox and the Defendant had a romantic relationship, but Ms. Cox said they did not. Mr. Smith believed that the Defendant did not like him because he was seeing Ms. Cox. (T-I, 65-67).

Ms. Cox used the pay phone at the bar to call the Defendant about a pickup truck. When Ms. Cox returned to Mr. Smith, they had a conversation about the Defendant and the pickup truck. (T-I, 68-70).

Mr. Smith testified further that a man named Tony came up to him and said that someone was messing with Mr. Smith's dog which was in the backseat of his car. Mr. Smith walked out to his car to check on his dog. As Mr. Smith was opening his car door, he sensed someone behind him and turned to look. As he looked over his shoulder, Mr. Smith saw the Defendant swinging something at him. Mr. Smith tried to turn away, but was hit in the back of the head and lost consciousness. Mr. Smith thought it was a pipe, a ball bat or a billy club that the Defendant used to hit him. (T-I, 71-73). The next thing Mr. Smith remembered after being knocked unconscious was waking up in the hospital. He did not remember anyone coming to his assistance, talking to Officer Holka at the scene, being placed in an ambulance, or talking to police officers and doctors at the hospital. (T-I, 73-75).

Mr. Smith testified further that he felt pretty bad when he woke up in the hospital. He didn't know how many times that the Defendant hit him, but he knew it was more than once because of the damage that was done. Mr. Smith had a fractured skull, a broken right eye socket, a broken cheek bone, a broken nose, his right inner ear wall collapsed and his lower teeth were knocked out. (T-I, 74-76). As days passed, Mr. Smith started to feel better and his memory also became better. Mr. Smith was eventually able to tell Detective Barner the details of the Defendant assaulting him. (T-I, 77-79). Photographs of Mr. Smith's injuries taken shortly after the assault were admitted into evidence. (T-I, 83-87). Mr. Smith had drunk two or three beers on the day of the assault, but was not intoxicated. Mr. Smith had also taken methadone, because he had been a heroin addict. (T-I, 93-94). Mr. Smith knew that Shanna Cox moved in with the

Defendant after the assault. (T-I, 109-113). Mr. Smith tried to contact Ms. Cox after the assault because he thought that she might have set him up for the assault. (T-I, 119).

Mr. Gregory Thompson testified that he worked for the Defendant Al McCuller on a lawn service crew during the Summer and Fall of 2001. (T-I, 123-126). In the middle of October, 2001, the Defendant told Mr. Thompson at work about how he assaulted a man named Larry Smith who Mr. Thompson did not know. (T-I, 127-128). The Defendant said that he kept punching Larry Smith until he was bleeding real bad and then left him laying on the ground. (T-I, 129-130). The Defendant said he beat Larry Smith because he was with Shanna Cox. (T-I, 130). The Defendant was laughing while telling Mr. Thompson about assaulting Larry Smith. (T-I, 131). The Defendant said Larry Smith looked like he was half dead. (T-I, 133). After thinking about it, Mr. Thompson called the Hazel Park Police Department and eventually gave a statement to Det. Barner. (T-I, 134-136). Mr. Thompson quit his job on November 11, 2001, because his time was getting shorted, but then the Defendant wanted him to work late on the anniversary of Mr. Thompson and his girlfriend. (T-I, 137-138). Mr. Thompson had never been promised anything for testifying. (T-I, 141).

On cross-examination, Mr. Thompson testified that Mr. Dan Hahn was also present when the Defendant described his assault upon Larry Smith. (T-I, 144-145). Mr. Thompson had just got out of jail before he began working for the Defendant. (T-I, 142). Mr. Thompson did not steal car parts from his father and keep them in the Defendant's shop. (T-I, 154). Mr. Thompson did not tell Dan Hahn that he was going to break into the Defendant's business and poison his dogs with antifreeze. (T-I, 155-156). Mr. Thompson felt that the Defendant had shorted his pay on occasion. (T-I, 147-148). On redirect, the assistant prosecutor brought out Mr. Thompson's

prior misdemeanor convictions. (T-I, 158-160). On recross, Mr. Thompson said that Dan Hahn had tried to talk him out of testifying. (T-I, 161).

Officer Paul Holka of the Hazel Park Police Department testified that he was dispatched at 7:57 P.M. on September 25, 2001, to Shotz Bar on a report of a man down in the parking lot. (T-I, 165-166). Officer Holka responded to the parking lot and observed Mr. Larry Smith kneeling on the ground. Ms. Shanna Cox was next to Mr. Smith. There was blood all over Mr. Smith's head. He was bleeding from both the mouth and the nose. Mr. Smith was incoherent, but gave the officer his name and date of birth. (T-I, 167-169). Officer Holka called for an ambulance and Mr. Smith was transported to Royal Oak Beaumont Hospital. Officer Holka spoke with Ms. Cox and learned that she had called 911. (T-I, 170-172). At 10:30 P.M., Officer Holka received a telephone call from a nurse at the hospital who said Mr. Smith had additional information for him. Officer Holka went to the hospital and spoke with Mr. Smith. Mr. Smith told the officer that he believed that he had been assaulted by Ramond McCuller because he had stolen Shanna Cox from McCuller. (T-I, 172-173). Mr. Smith still could not remember anything. (T-I, 181). Officer Holka looked for McCuller at his residence, but did not locate him. (T-I, 174). Officer Holka could smell the odor of intoxicants coming from Mr. Smith. Officer Holka could not tell if Mr. Smith was intoxicated in addition to being injured. (T-I, 175).

Detective Martin Barner of the Hazel Park Police Department testified that he was the officer-in-charge of this case. He spoke with Larry Smith on the telephone the day after he was assaulted. Larry Smith was in the hospital and heavily sedated. (T of 5/9/03, hereafter T-II, 5-8). Mr. Smith came into the police station on October 5, 2001, after he was discharged from the hospital. Mr. Smith indicated that he and Shanna Cox were drinking in Shotz Bar and Ms. Cox telephoned the Defendant concerning a vehicle. A short time after that, someone told Mr. Smith

that a person was beating a dog in the parking lot. Mr. Smith went outside to check on his dog. As Mr. Smith was about to open his car door, he sensed someone was behind him. Mr. Smith turned and saw the Defendant in mid-swing with a pipe or bat coming down at his head. Mr. Smith remembered being struck and then losing consciousness. (T-II, 8-11).

Det. Barner testified further that he checked LEIN and obtained the same address, 1033 East Muir in Hazel Park, for Shanna Cox and the Defendant. Det. Barner sent letters to Ms. Cox and the Defendant asking them to contact him. The Defendant eventually telephoned Det. Barner and said he was too busy to come in for an interview. He also said that he had an alibi for the date that Mr. Smith was assaulted. (T-II, 16-19). Det. Barner eventually pulled the Defendant over for a traffic offense without identifying himself as the detective in charge of this case. The Defendant said the truck which he was driving was registered to his live-in girlfriend. The truck was registered to Shanna Cox. (T-II, 20-21). Det. Barner set up a surveillance for Shanna Cox, followed her to a gas station and obtained a written statement from her. (T-II, 24-25). Det. Barner did not offer Mr. Thompson anything in return for his statement. (T-II, 28-29). Following the testimony of Det. Barner, the People rested. (T-II, 46).

The Defendant called Mr. Daniel Hahn as a defense witness. Mr. Hahn testified that he worked for the Defendant and was his friend. (T-II, 48; 52). Mr. Hahn worked with Greg Thompson for the Defendant. Greg Thompson was fired by the Defendant and said that he was going to get even with the Defendant. (T-II, 49-51). The Defendant's shop was broken into and there was a plan to poison the Defendant's dog. (T-II, 50-51). Greg Thompson asked Mr. Hahn for the code for the alarm box at the Defendant's business. Mr. Hahn was never present when the Defendant said that he had beaten Larry Smith. (T-II, 52). Mr. Hahn knew Greg Thompson to keep stolen property at the Defendant's business. (T-II, 52-53). Mr. Hahn never went to the

police to tell them what he knew about Larry Smith. (T-II, 56). Mr. Hahn knew that Shanna Cox was staying with the Defendant off and on. (T-II, 57).

Ms. Shanna Cox testified as a defense witness that she and Larry Smith were at Shotz Bar on September 25, 2001. They had been drinking since 10 A.M. that day. Ms. Cox called the Defendant from the bar to talk to him about her truck. (T-II, 65-66). Ms. Cox was not lovers with either Larry Smith or the Defendant (T-II, 66-67). Ms. Cox worked for the Defendant two or three days a week as a weed wacker and also took care of his dogs. (T-II, 69). Larry Smith left Shotz Bar first as Ms. Cox stopped to use the bathroom. When Ms. Cox went out to the parking lot, she saw Mr. Smith laying on the ground. She ran back into the bar and asked the barmaid to call 911. Ms. Cox stayed with Mr. Smith until the ambulance came. (T-II, 70-72). Mr. Smith's face was bloody and he was incoherent. (T-II, 96-97). Prior to the assault on Mr. Smith, Ms. Cox had been staying at Mr. Smith's house. (T-II, 75). After the assault, Ms. Cox would talk to Mr. Smith on the phone while he was in the hospital and Mr. Smith would threaten her. Because of the threats, Ms. Cox stayed at the Defendant's house or at the Defendant's warehouse. (T-II, 78-80). Ms. Cox did not report the threats to the police. (T-II, 83). The Defendant's house was about a mile and a half from Shotz Bar. (T-II, 92).

The Defendant Raymond "Al" McCuller stated under oath outside the presence of the jury that he was aware of his right to testify, but wished to rely upon his right not to testify. (T-II, 105-106). Following the Defendant's statement, the defense rested. (T-II, 107).

Det. Martin Barner was recalled as a rebuttal witness. Det. Barner testified that Shanna Cox never told him that Larry Smith was harassing or threatening her. (T-II, 108).

After closing arguments by the assistant prosecutor and defense counsel, the trial court

instructed the jury concerning the applicable law. (T-II, 155-170). The Defendant had no objections to the jury instructions as given. (T-II, 170). On May 12, 2003, the jury found the Defendant guilty as charged of assault with intent to commit great bodily harm. (T-II, 174-175). The Defendant acknowledged having a prior felony conviction. (T-II, 176). On June 17, 2003, the trial court sentenced the Defendant for his assault great bodily harm conviction and as a habitual offender, second offense, to a term of two to fifteen years imprisonment. (T of 6/17/03, 9). A copy of the sentencing transcript is attached to this brief as Appendix D. The trial court denied the Defendant's Motion For Resentencing in an Opinion And Order entered on June 10, 2004. A copy of the Opinion And Order of the trial court is attached to this brief as Appendix C. A copy of the Presentence Report prepared in this case is attached to this brief as Appendix E.

The Court of Appeals affirmed the Defendant's convictions and sentences in an unpublished opinion (Appendix B) entered on January 11, 2005. The Defendant filed an application for leave to appeal to this Court. This Court entered an order (Appendix A) directing the parties to file supplemental briefs addressing the effect, if any, of the opinion of the United States Supreme Court in Blakely v Washington, supra., upon the prison sentence imposed in this case.

ARGUMENT

I. THE OPINION OF THE UNITED STATES SUPREME COURT IN BLAKELY V WASHINGTON, 542 US 296 (2004) HAS NO EFFECT UPON THE INDETERMINATE SENTENCE OF 2 TO 15 YEARS IMPOSED UPON THE DEFENDANT PURSUANT TO THE SENTENCING SCHEME ADOPTED BY THE MICHIGAN LEGISLATURE.

The Defendant contends that his indeterminate sentence of 2 to 15 years was imposed in violation of the subsequent decision of the United States Supreme Court in the case of Blakely v Washington, 542 US 296; 124 S Ct 2531, 159 L Ed 2d 403 (2004). The Defendant did not preserve this issue by objecting on constitutional grounds in the trial court. **The standard of review for this question of law is de novo review. People v Sierb, 456 Mich 519; 522 (1998).** The People submit for the reasons set forth below that the Defendant's indeterminate sentence of 2 to 15 years imprisonment is a lawful sentence and is not in violation of the principles set forth in Blakely v Washington, supra.

A. The United States Supreme Court Found That The Defendants In Apprendi v New Jersey, 530 US 466 (2000), Blakely v Washington, 542 US 296 (2004) And United States v Booker, 543 US 125 S Ct 738, 160 L Ed2d 621 (2005) Were Deprived Of Their Constitutional Right To A Trial By Jury Because Pursuant To Statute The Trial Judges In Those Cases Were Able To Find Facts Which Increased The Maximum Sentences For The Offenses Of Which The Defendants Were Convicted.

A defendant in a criminal case is entitled to a trial on each element of the charged offense before an impartial jury. United States Constitution, Am. VI; Michigan Constitution, art 20, § 20. In Apprendi v New Jersey, supra., the Supreme Court reviewed a defendant's sentence following his convictions in a state court. The defendant in Apprendi, supra. was convicted by his pleas of guilty to two counts of possession of a firearm and one count of possession of a bomb. The

maximum determinate sentence for those convictions was 10 years. Pursuant to a state statute, the trial court found that the defendant had acted with intent to intimidate an individual based upon race and sentenced the defendant to an enhanced determinate sentence of 12 years.

The Supreme Court held that because the trial court's finding of fact increased the maximum sentence for the offense of which the jury had convicted the defendant, the defendant was deprived of his right to a trial by jury on an element of the offense for which he was sentenced. The Supreme Court stated its holding as follows:

> "Other than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." (Emphasis supplied).
>
> Apprendi v New Jersey, supra., 490.

Thus the Supreme Court stressed in Apprendi, supra., that a statute which permitted the trial court to increase the maximum sentence of a defendant through additional findings of fact violated the defendant's right to a trial by jury.

In Blakely v Washington, supra., the Supreme Court applied the Apprendi principles to the State of Washington's determinate sentencing scheme. In Blakely, supra., the defendant was charged with first degree kidnapping in the abduction of his estranged wife. In a plea agreement, the defendant pleaded guilty to the offense of second degree kidnapping. The difference between first and second degree kidnapping was that first degree kidnapping required the additional element of deliberate cruelty. Under Washington's determinate sentencing scheme, the trial court had to impose a determinate sentence of between 49 and 53 months. The defendant was then required to serve that entire sentence. Washington's sentencing scheme provided for neither a minimum sentence nor parole. The trial court could, however, based upon additional findings of fact, increase the defendant's maximum determinate sentence. The trial court in Blakely, supra.,

over the defendant's objection, held a hearing and found that the defendant had acted with deliberate cruelty. The trial court then imposed a sentence of 90 months imprisonment.

The majority opinion of the Supreme Court in Blakely, supra., authored by Justice Scalia, held that Washington's sentencing scheme deprived the defendant of his constitutional right to a trial by jury. The Supreme Court reiterated its holding in Apprendi, supra., that other than the fact of a prior conviction, any fact that increases the maximum penalty of a determinate sentence must be submitted to a jury. Blakely, supra.,. The Supreme Court defined the statutory maximum sentence as the maximum sentence a trial judge may impose based upon the facts reflected in the verdict of the jury or admitted by the defendant. Blakely, S Ct 2531; 2537 (2004).

In United States v Booker, 543 US 125 S Ct 738, 160 L Ed2d 621 (2005), the Supreme Court applied the Apprendi-Blakely principles to the Federal Sentencing Guidelines which were promulgated by a sentencing commission authorized by Congress. The defendant in Booker, supra., was convicted by a jury in federal court of possession of at least fifty grams of cocaine. The Federal Sentencing Guidelines called for a determinate sentence of 210 to 262 months in prison. The trial court found by a preponderance of the evidence that the defendant possessed an additional 566 grams of crack cocaine and sentenced him to a determinate sentence of 30 years in prison, a sentence nearly 10 years longer that the 21 year 10 month determinate sentence permitted by the facts proved to the jury beyond a reasonable doubt. In six opinions, the Supreme Court found no constitutionally significant distinction between the federal determinate sentencing scheme and the determinate sentencing scheme of the State of Washington. The Supreme Court held, therefore, that when the trial court found facts which increased the prescribed maximum sentence, the defendant's right to a trial by jury under the Sixth Amendment was violated. The majority in Booker, supra., "saved" the Federal Sentencing

Guidelines by holding that those guidelines were not mandatory. No justices set forth an opinion that a jury was required to be the fact finder as to the minimum sentence in an indeterminate sentencing scheme.

B. The Michigan Legislature Has Enacted An Indeterminate Sentencing Scheme Which Requires A Minimum Sentence Set By The Trial Court Within A Range Required By The Sentencing Guidelines And A Maximum Sentence Which May Not Be Increased By The Trial Court, Other Than Based Upon A Prior Felony Conviction Of The Defendant.

MCL 769.8(1) prohibits a trial court from settling a definite (determinate) term of imprisonment for a defendant. Rather, a trial court must set a minimum sentence within the range required by the Sentencing Guidelines and the maximum sentence provided by statute for the offense of which the defendant was convicted. MCL 769.8(1) reads as follows:

> "**769.8. Indeterminate sentence; first conviction**
> Sec. 8. (1) When a person is convicted for the first time for committing a felony and the punishment prescribed by law for that offense may be imprisonment in a state prison, the court imposing sentence shall not fix a definite term of imprisonment, but shall fix a minimum term, except as otherwise provided in this chapter. The maximum penalty provided by law shall be the maximum sentence in all cases except as provided in this chapter and shall be stated by the judge in imposing the sentence."

MCL 769.34(2)(b) prohibits the trial court from imposing a minimum sentence that exceeds 2/3 of the statutory maximum sentence. MCL 769.34(3) permits a trial court to depart from the range for the minimum sentence provided for by the Sentencing Guidelines if the trial court places on the record substantial and compelling reasons for the departure. MCL 769.11 permits a trial court to increase a defendant's maximum sentence only based upon a prior felony conviction.

Under Michigan's sentencing scheme, a trial court must impose the maximum sentence prescribed by statute. A trial court may not increase a defendant's statutory maximum sentence upon any findings of fact, other than the fact of a defendant's prior felony conviction. A trial court must also impose a minimum sentence. Michigan's indeterminate sentencing scheme is vastly different from the determinate sentencing schemes of the State of Washington and the federal system.

C. This Court Correctly Held In People v Claypool, 470 Mich 715 (2004) That Michigan's Indeterminate Sentencing Scheme Was Not Affected By The Decision Of The United States Supreme Court In Blakely v Washington, supra.

This Court correctly held in People v Claypool, 470 Mich 715 (2004) that Michigan's scheme of indeterminate sentencing was not affected by the United States Supreme Court's decision in Blakely v Washington, supra. In Claypool, supra., this Court held as follows:

> "*Blakely* concerned the Washington state determinate sentencing system, which allowed a trial judge to elevate the maximum sentence permitted by law on the basis of facts not found by the jury but by the judge. Thus, the trial judge in that case was required to set a fixed sentence imposed within a range determined by guidelines and was able to increase the maximum sentence on the basis of judicial fact-finding. This offended the Sixth Amendment, the United States Supreme Court concluded, because the facts that led to the sentence were not found by the jury. *Blakely, supra* at 2536.
>
> Michigan, in contrast, has an indeterminate sentencing system in which the defendant is given a sentence with a minimum and a maximum. The maximum is not determined by the trial judge but is set by law. MCL 769.8. The minimum is based on guidelines ranges as discussed in the present case and in *Babcock, supra.* The trial judge sets the minimum but can never exceed the maximum (other than in the case of a habitual offender, which we need not consider because *Blakely* specifically excludes the fact of a previous conviction from its holding). Accordingly, the Michigan system is unaffected by the holding in *Blakely* that was designed to

protect the defendant form a higher sentence based on facts not found by the jury in violation of the Sixth Amendment."

People v Claypool, supra., 730-731, n.14.

Justices Taylor, Markman, Cavanaugh, Weaver, Young and then Chief Justice Corrigan all concurred in the holding set forth above. Then Chief Justice Corrigan expressed that mandatory minimum sentences in Michigan could be affected by Blakely, supra. People v Claypool, supra., 739-740.

This Court properly held in People v Claypool, supra., that Michigan's sentencing scheme was not affected by Blakely v Washington, supra., because a trial court in Michigan sets the maximum sentence prescribed by statute and cannot increase that maximum sentence by any additional factfinding. In Michigan, a trial court has no authority to inflict greater punishment than allowed by the jury's verdict. This Court should reaffirm its holding in People v Claypool, supra., in the case of People v Drohan, No. 127489, and in this case.

D. The United States Supreme Court Has Held That Indeterminate Sentencing Schemes Are Constitutionally Distinct From Determinate Sentencing Schemes Which Permit A Trial Court To Increase The Maximum Determinative Sentence Based Upon Facts Not Proven To A Jury.

Justice Scalia, in the majority opinion in Blakely v Washington, supra., recognized the constitutional distinction between a determinate maximum sentence and a maximum sentence prescribed by the statute in an indeterminative sentencing scheme. In that regard, the Supreme Court held as follows:

"This argument is flawed on a number of levels. First, the Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. Indeterminate sentencing does not do so. It increases

judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty. Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicity rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence—and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury.

But even assuming that restraint of judicial power unrelated to the jury's role is a Sixth Amendment objective, it is far from clear that *Apprendi* disserves that goal. Determinate judical-factfinding schemes entail less judicial power than indeterminate *jury*-factfinding schemes."

Blakely v Washington,

In Michigan, unlike in Washington, a trial court cannot increase a defendant's maximum sentence based upon facts not proven to a jury.

It is also significant that the majority opinion in Blakely v Washington, supra., cited with approval its prior decisions in McMillan v Pennsylvania, 477 US 79 (1986) and Harris v United States, 536 US 545 (2002). In the McMillan, supra., the Supreme Court held that a defendant's right to a jury trial was not violated when a statute permitted the trial judge to impose a certain minimum sentence based upon an additional finding of fact.

In Harris v United States, supra., a federal statute permitted a trial court to impose a mandatory minimum sentence based upon an additional finding of fact. In affirming the defendant's conviction, the Supreme Court found no violation of the principles set forth in

Apprendi v New Jersey, supra., because the statute in question did not permit the trial court to increase the statutory maximum sentence. The Supreme Court reasoned as follows:

> "*McMillan* and *Apprendi* are consistent because there is a fundamental distinction between the factual findings that were at issue in those two cases. *Apprendi* said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime—and thus the domain of the jury—by those who framed the Bill of Rights. The same cannot be said of a fact increasing the mandatory minimum (but not extending the sentence beyond the statutory maximum), for the jury's verdict has authorized the judge to impose the minimum with or without the finding. As *McMillan* recognized, a statute may reserve this type of factual finding for the judge without violating the Constitution."
>
> Harris v United States, supra., 557.

As indicated above, the Supreme Court noted the continuing validity of McMillan, supra., and Harris, supra., in Blakely v Washington, supra.

Michigan, unlike Washington, has an indeterminate sentencing scheme in which the trial court must impose the statutory maximum sentence for the offense committed. The trial court must also impose a minimum sentence within the range recommended by the Sentencing Guidelines. The trial court cannot increase the maximum sentence upon any findings of fact not proven to the jury, except for the fact of a prior felony conviction. The Supreme Court in Blakely, supra., recognized that such an indeterminate sentencing scheme under which the trial court cannot increase the maximum sentence does not deprive a defendant of his constitutional right to a trial by jury. By its own language, the decision of the Supreme Court in Blakely v Washington, has no effect upon Michigan's indeterminate sentencing scheme.

E. State Courts In Other States With Indeterminate Sentencing Schemes Have Held That The Decision Of The United States Supreme Court In Blakely v Washington, supra., Does Not Affect Their Sentencing Schemes.

Courts in several other states with indeterminate sentencing schemes have held that the decision of the United States Supreme Court in Blakely v Washington, supra., does not affect their sentencing schemes. In Commonwealth v Bromley, 862 A2d 598 (Pa. Super. 2004), the Pennsylvania intermediate appellate court held that by Blakely's own language, it did not affect Pennsylvania's indeterminate sentencing scheme. The Pennsylvania court stated that holding as follows:

> "In *Blakely*, the Supreme Court specifically distinguished between the judicial fact-finding in the determinate sentence scheme in Washington, and the exercise of judicial discretion which takes place in indeterminate sentencing schemes like Pennsylvania's. The significant finding of both *Apprendi* and *Blakely* appears to be that if a sentencing scheme mandates a certain sentence for a certain crime and only allows the imposition of a greater sentence based upon specific factual findings about the underlying crime, then, unless those factual findings are made by the jury, the scheme runs afoul of the Sixth Amendment. Thus, we hold that *Blakely* does not implicate the Pennsylvania scheme, where there is not promise of a specific sentence, and a judge has the discretion to sentence in the aggravated range so long as he or she provides reasons of the sentence."
>
> Commonwealth v Bromley, supra., 603.

The Pennsylvania appellate court reached the same conclusion in the case of Commonwealth v Smith, 863 A2d 1172; 1178-1179 (Pa. Super. 2004).

Likewise, the Hawaii Supreme Court found that Hawaii's indeterminate sentencing scheme was unaffected by the decision of the Supreme Court in Blakely v Washington. State v Rivera, 102 P3d 1044; 1055 (Hawaii 2004). The Idaho Supreme Court has also held that its indeterminate sentencing scheme is not affected by the decision in Blakely, supra. State v Stover, 104 P3d 969, 971-973 (Idaho 2005). The People have not found a decision in which an

indeterminate sentencing scheme has been held to be in violation of the principles set forth in Blakely v Washington, supra.

F. This Case Does Not Involve An Intermediate Sanction Cell Issue, But If It Did, A Prison Sentence Would Not Constitute A Violation Of The Principles Set Forth In The Decision Of The United States Supreme Court In Blakely V Washington, Supra.

The Defendant argues in his application for leave to appeal that the Sentencing Guidelines were improperly scored in violation of Blakely v Washingon, supra., because the trial court made findings of fact that were not part of the jury's verdict. For the reasons set forth earlier in this brief, such findings of fact did not increase the statutory maximum sentence imposed by the trial court and therefore are permissible under Blakely, supra, McMillan v Pennsylvania, supra and Harris v United States, supra.

The Defendant also contends that the trial court's scoring of OV 1, OV 2 and OV 3 was clearly erroneous. The Defendant did not object to the scoring of OV 1 or OV 2 and therefore did not preserve this issue as to those variables. The Court of Appeals found that OV 1, OV 2 and OV 3 were all properly scored by the trial court. The Court of Appeals held in that regard as follows:

> "Defendant argues that the trial court lacked sufficient evidence to score Offense Variable one (OV 1) at ten points instead of at a zero. The trial court must assess a score of ten points under OV 1 if the victim was touched by a weapon other than a knife or stabbing weapon. MCL 777.31 Zero points are to be assessed if no aggravated use of a weapon occurred. At trial, the victim testified that he saw defendant making a downward motion toward his head with a metal pipe or a bat. The victim testified that he was then struck in the head and rendered unconscious. This testimony amply supported the trial court's assessment of ten points for OV 1.
>
> Defendant also argues that Offense Variable two (OV 2) was erroneously scored at one point. The trial court must assess one point under OV 2 if the offender possessed any potentially lethal weapon other than a firearm, incendiary device, knife or

other stabbing weapon. MCL 777.32. As stated *supra*, the victim testified that defendant assaulted him with a metal pipe or bat. A metal pipe or bat used to strike a person in the head is unquestionably a potentially lethal weapon. The victim's testimony was sufficient to support as assessment of one point for OV 2.

Finally, defendant argues that the trial court erred in assigning twenty-five points for Offense Variable three (OV 3), when there was no medical evidence introduced at trial to substantiate the victim's injuries. The trial court must assess twenty-five points under OV 3 if life threatening or permanent incapacitating injury occurred to the victim. MCL 777.33. As the trial court noted in its order denying defendant's motion for resentencing, the victim testified that he suffered a broken nose, broken eye socket and broken cheekbone, and his skull was fractured and his inner ear wall caved in as a result of the beating. The victim also testified that he suffered a concussion and a closed head injury. This testimony, as well as Thompson's testimony that defendant stated the victim 'could have been dead,' and described the victim as 'half dead' after the beating, supported the a factual finding that the victim suffered life threatening injuries. Further, the victim testified that his already bad hearing worsened as a result of the beating, establishing that the victim suffered permanently incapacitating injury. The fact that the victim's testimony was not corroborated by a medical professional or by the admission of the victim's medical records does not alter the fact that the victim's testimony alone was sufficient to establish the nature and extent of his injuries for the purpose of assessing twenty-five points under OV 3. With our determination that OV's 1, 2 and 3 were appropriately scored, defendant's minimum sentence of two years falls within the appropriate sentencing guidelines range and must be affirmed by this Court. MCL 769.34(10) *Kimble, supra* at 309."

People v Raymond McCuller, Unpublished Per Curiam Opinion of the Court of Appeals (No. 250000, decided January 11, 2005). (Appendix A).

The Court of Appeals did not err in finding that the Sentencing Guidelines were correctly scored.

In this Court's order of November 28, 20058, this Court invited briefs amicus curiae "...on the intermediate sanction cell issue..." As set forth above, the Sentencing Guidelines were properly scored and called for a minimum sentence of between 5 and 28 months. The trial

court's sentence of 2 to 15 years was within the range recommended by the Sentencing Guidelines and therefore should be affirmed on appeal. MCL 769.34(10); People v Garza, 469 Mich 431; (2003). There is no "intermediate sanction cell issue" in this case. This Court has stated that a court should not formulate a rule of constitutional law broader that the precise facts to which it is to be applied. Ohio v Akron Center for Reproductive Health, 497 US 502; 514 (1990).

In light, however, of the language in this Court's order of November 28, 2005, the People will address a hypothetical situation in which the Sentencing Guidelines in this case called for an intermediate sanction and the trial court, for substantial and compelling reasons, imposed its sentence of 2 to 15 years. The United States Supreme Court has repeatedly recognized that a trial court may base its sentence upon findings of facts not made by the jury. McMillan v Pennsylvania, supra., Harris v United States. A trial court may not, however, make an independent finding of fact which increases the statutory maximum sentence of a defendant. Blakely v Washington, supra. In Blakely, supra., the Supreme Court defined "statutory maximum" as the maximum sentence a defendant would receive if punished according to the facts reflected in the jury's verdict or admitted by the defendant.

The starting point, therefore, in determining if a trial court's sentence constituted a Blakely violation is the statutory maximum sentence allowed based upon the jury's verdict. In the instant case and in our hypothetical, the Defendant was convicted of assault with intent to commit great bodily harm less than murder. The statutory maximum sentence for that offense is 10 years. MCL 750.84. The Defendant admitted that he had a prior felony conviction (T-II, 176), so that statutory maximum sentence was properly increased to 15 years pursuant to MCL 769.11.

The trial court sentenced the Defendant to a term of 2 to 15 years imprisonment and therefore did not increase the statutory maximum and did not violate Blakely, supra.

The Defendant argues that the Sentencing Guidelines should have been scored so as to call for a minimum sentence of 0 to 11 months. If that were the situation and the trial court found substantial and compelling reasons to depart from the Sentencing Guidelines and sentenced the Defendant to a term of 2 to 15 years, there still would not be a Blakely violation. Under those circumstances, the trial court would be increasing the Defendant's *minimum sentence* based upon its own findings of fact. The Supreme Court has recognized repeatedly that such action as to the minimum sentence is altogether proper. McMillan v Pennsylvania, supra., Harris v United States, supra., Blakely v Washington, 124 S Ct 2531; 2538 (2004).

In Blakely, supra., the range of from 49 to 53 months required by statute was for the *maximum determinate sentence* upon the facts admitted by the defendant. When the trial court increased that maximum sentence based upon its own findings of fact, the trial court deprived defendant Blakely of his constitutional right to a trial by jury as to those facts. In our hypothetical, no such increase in the statutory maximum sentence of 15 years occurred.

Pursuant to MCL 769.8, a trial court under Michigan's indeterminate sentencing scheme "shall" impose the statutory maximum sentence as the maximum sentence. A trial court has no discretion in that regard. Pursuant to MCL 769.34(2)(b), the minimum sentence shall not exceed 2/3 of the statutory maximum sentence. The Sentencing Guidelines serve to reduce further the minimum sentence, though a trial court may increase the minimum sentence beyond the range recommended by the Sentencing Guidelines based upon its own finding of substantial and compelling reasons. MCL 769.34(3). The fact that MCL 769.34(4) may call for a jail sentence not to exceed 12 months does not change Michigan's indeterminate sentencing scheme. A trial

court under Blakely, supra., is permitted to increase a defendant's minimum sentence based upon its own findings of fact.

The Sentencing Guidelines in this case were properly scored and the Defendant was sentenced within the range recommended by the guidelines. In our hypothetical, the trial court did not commit a Blakely, violation because the trial court increased the defendant's minimum sentence, not his statutory maximum sentence. The Defendant knew from the information in this case that he risked a statutory maximum sentence of 15 years imprisonment. As Justice Scalia stated in Blakely, supra., a defendant has no legal right to a lesser sentence.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AND DEPRIVE THE DEFENDANT OF A FAIR TRIAL IN LIMITING THE DIRECT EXAMINATION OF A DEFENSE WITNESS AS TO THE POSSIBLE BIAS OF A PROSECUTION WITNESS.

The Defendant contends in his application for leave to appeal that the trial court erred by limiting the direct examination of a defense witness concerning the possible bias of a prosecution witness. The Defendant preserved this issue in the trial court. (T-II, 50-51). **The standard of review for a trial court's decision on the admissibility of evidence is for an abuse of discretion. People v Golochowicz, 413 Mich 298; 322 (1982). An abuse of discretion takes place only if an unprejudiced person could find no justification for the ruling of the trial court. People v Rockwell, 188 Mich App 405; 410 (1991). A trial court's decision on a close evidentiary question cannot, by definition, be an abuse of discretion. People v Layher, 464 Mich 756; 761 (2001).** The People submit that the record in this case indicates no abuse of discretion on the part of the trial court as to the evidentiary decision in question.

Mr. Gregory Thompson testified as a prosecution witness that the Defendant had made admissions to him concerning the assault upon Mr. Larry Smith. Mr. Thompson was a former employee of the Defendant and testified that he had voluntarily left his job with the Defendant. The Defendant called Mr. Daniel Hahn, a current employee of the Defendant, to show Mr. Thompson's alleged bias toward the Defendant. Mr. Hahn's testimony as to the bias of Mr. Thompson toward the Defendant went as follows:

"Q Why are you here?
A Talk about Greg. [Thompson]
Q How long did you work with Greg?
A About four months.
Q And, what capacity did you work with Greg, what did you guys do?
A Cut lawns.
Q About how many days a week?
A Four.

Q Were you present during a time when everyone in the shop was warned about Mr. Smith coming around?

MR. DAVIS: Objection, your Honor.

MS. BARE: Your Honor, this is rebuttal of Mr. Thompson's testimony that he was never told that they were warned about Mr. Smith coming around the shop and threatening Shanna Cox.

MR. DAVIS: Your Honor, first of all it's irrelevant.

Second of all it's impeachment on extrinsic matter, which is inappropriate under Michigan Rule of Evidence 608D.

THE COURT: The Court will sustain the objection.

Q **(By Ms. Bare, continuing)** Were you ever warned?

A Yes.

Q Was everybody present?

A Yes.

Q Were there any threats ever made by Mr. Thompson regards Mr. McCuller?

A He always told me he was going to get even with him.

Q Did he tell you why?

A He didn't specify, no.

Q Was there ever an event regarding the B and E regarding Mr. McCuller's shop?

A Yes.

MR. DAVIS: Your Honor, may we approach the –

THE COURT: (Interposing) You may approach. (Whereupon a discussion was had at the Bench, Out of the hearing of the Jury and the Court Reporter.)

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Q **(By Ms. Bare, continuing)** Mr. Hahn, did you plan to break into Mr. McCuller's shop?

A No.

Q How did that come about?

MR. DAVIS: Your Honor, the Court has already ruled on this alleged breaking into Mr. McCuller's shop.

THE COURT: The Court will sustain the objection.

Q **(By Ms. Bare, continuing)** Was there a plan to poison the dog?

A Yes.

MR. DAVIS: Your Honor, same objection. That is completely irrelevant and it is improper under 608 B.

THE COURT: The Court will sustain the objection.

Q **(By Ms. Bare, continuing)** Well, was Mr. Thompson fired or did he quit?

A Fired.
Q Why was he fired?
A Always complaining about work. Either not having enough work, too much work, he only wanted to work one to two days a week.
Q Were you entrusted with the code?
A Yes.
Q To the alarm box to Mr. McCuller's business?
A Yes.
Q Who asked you for that code?
A Greg.

***

Q **(By Ms. Bare, continuing)** Did Greg keep certain property in Mr. McCuller's business?
A Yes.
Q What property was that?
A Couple of fish tank lids and some picture frames.
Q Okay.
What about an in-take?
A Well he brought that.
Q Where did he bring it from?
A Either took it---he stole it from his father.
MS. BARE: I have no further questions.
THE COURT: Mr. Davis.

CROSS-EXAMINATION

BY MR. DAVIS:

Q Mr. Hahn, you told us why you are here today, didn't you?
A Yes.
Q You're here quote 'talk about Greg', aren't you?
A Yes.
Q To say bad things about Greg, correct?
A No, to say the truth.
Q Well, apparently these bag [sic] things is what you want the Jury to know, isn't that correct?
A Yes." (T-II, 49-52).

As set forth above, trial court permitted the Defendant to elicit testimony from Mr. Hahn that Mr. Thompson had been fired from his job by the Defendant and that Mr. Thompson had made threats against the Defendant. Although the trial court subsequently sustained the assistant prosecutor's objection, the Defendant also brought out from Mr. Hahn in the presence of the jury a possible breaking and entering of the Defendant's shop and a plan to poison the Defendant's

dog. Mr. Hahn further testified that Mr. Thompson had requested from him the code for the alarm box to the Defendant's business. Finally, Mr. Hahn testified that Mr. Thompson kept property that he had stolen from his own father at the Defendant's business. The People submit that the trial court allowed more than ample latitude in permitting Mr. Hahn to testify as to possible bias on the part of Mr. Thompson.

The Court of Appeals has held that a trial court has wide discretion in determining the limits on evidence as to a witness's possible bias. People v Perkins, 116 Mich App 624; 628 (1992), rev'd on other grounds. In Perkins, supra., the defendant testified as to past drug dealings with the husband of the victim. Such testimony was admitted into evidence to show the victim's bias and a motive to testify falsely. The trial court prevented the defendant from testifying to a more recent drug deal with the victim's husband. The Court of Appeals found no abuse of discretion as to that evidentiary ruling of the trial court. In regard to the trial court's ruling, the Court of Appeals held as follows:

> "The inference defendant sought to establish by the excluded evidence was highly tenuous, and we believe that defendant was afforded sufficient opportunity to demonstrate the possibility that the prosecution's chief witnesses may have had a motive for testifying falsely. There was no abuse of discretion by the trial court in excluding testimony concerning other drug activities of the complainant's husband."
>
> People v Perkins, supra,. 629.

In the present case, as in Perkins, supra., the Defendant was afforded sufficient opportunity to demonstrate the possible bias upon the part of a prosecution witness.

The Defendant's reliance upon the cases of People v Layher, 464 Mich 756 (2001) and People v Minor, 213 Mich App 682 (1995) is unfounded. In Layher, supra., a criminal sexual conduct case, the trial court permitted the prosecution to bring out the fact that an investigator for

the defendant who was called as a defense witness had been tried and acquitted of a criminal sexual conduct charge. This Court held that it was within the discretion of the trial court to admit such evidence of possible bias. This Court also stressed that a trial court's decision on a close evidentiary question cannot, by definition, constitute an abuse of discretion. People v Layher, supra., 761.

In People v Minor, supra., the trial court refused to permit the defendant to bring out the fact that his companion in the crime was testifying against the defendant under a grant of immunity. The Court of Appeals held that the trial court erred in that evidentiary ruling. The Court of Appeals also found, however, that the error was harmless in nature and affirmed the defendant's conviction.

The trial court in this case permitted the Defendant to bring out ample evidence of Mr. Thompson's possible bias toward the Defendant. People v Perkins, supra., 629. In addition, even when the trial court ruled against the Defendant, the evidence of alleged bias in question had already been set forth before the jury. The trial court's decision on those evidentiary questions did not constitute an abuse of discretion. Finally, any possible error arising from the trial court's evidentiary rulings was harmless in nature. The Defendant has not demonstrated that, but for all alleged error, it is more probable than not that a different outcome would have resulted. People v Lukity, 460 Mich 484; 495 (1999). The Defendant's application for leave to appeal should not be granted because of this claim of error.

RELIEF

WHEREFORE, David G. Gorcyca, Prosecuting Attorney in and for the County of Oakland, by Robert C. Williams, Assistant Prosecuting Attorney, respectfully requests this Honorable Court to deny Defendant-Appellant's Application For Leave To Appeals.

Respectfully Submitted,

DAVID G. GORCYCA
PROSECUTING ATTORNEY
OAKLAND COUNTY

JOYCE F. TODD
CHIEF, APPELLATE DIVISION

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DATED: December 20, 2005